1924

Future Property Interests in Kentucky

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A future property interest is usually defined as an interest which entitles the owner to possession of the property only at a future period, as for instance where one is given the fee in land to take effect upon the death of the person in possession. In treating of the subject of future interests, it is customary to consider the following topics: reversion, remainders, executory devises, construction of limitations, limitations to classes, powers, rule against perpetuities, and restraints on alienation. In summarizing the law of future interests in Kentucky, it is proposed to consider it under the usual heads.

I. REVERSIONS, POSSIBILITY OF REVERTER AND RIGHT OF ENTRY.

In *Alexander v. DeKermel* the court cites with approval the common law definition of a reversion as given by Blackstone and Kent. Blackstone's statement defines it in these words: "An estate in reversion is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him;" and "Sir Edward Coke describes a reversion to be the returning of land to the grantor or his heirs after the grant is over."

The court after attributing to Kent the statement "that reversion, in the general sense, must be familiar to the laws of all nations who admitted of private property in lands (4 Kent 389)" concludes "that from the nature and purpose of reversion they are not as inimical to our alodial system of titles to lands as remainders, on which the doctrine of English entails were principally based."

The owner of the property in question in the case of *Alexander v. DeKermel* conveyed in trust to himself for life, and then to his heirs. Upon his death he devised the land in fee. The question before the court was whether the grantor's heirs, who were his brothers and sisters, were entitled to take or whether the devisee under the will took. It was held that the devise was good since "at common law, if a man seized of an estate limited it to

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1 81 Ky. 345, 350; 5 Ky. Law Rep. 382.
one for life, remainder to his right heirs, they would take, not as remaindermen, but as reversioners, and it would be, moreover, competent for him, as being himself the reversioner, after making such a limitation, to grant away the reversion."

This result is, of course, due to the fact that a living person can have no heirs and that the law leaves in the grantor any part of the fee not conveyed in the deed. Since what was intended as a remainder could not take effect until the death of the grantor, at which time it would be determined who his heirs would be, there would by operation of law be a reversion in the grantor in the meantime. This would blend, as the court says, in the life estate and give him a fee so that he could make such a disposition as he wished in his will. By blending with the life estate the court, of course, means there would be a merger of the lesser estate in the greater.

At first glance the facts in the case of Frank Fehr Brewing Company v. Johnstown, et al., seem the same as those in Alexander v. DeKermel. The owner of land conveyed to trustees to the use of the grantor for life, and for her heirs, after her death, if she died intestate, but subject to any disposition she might make by will, or by deed in the nature of a will. Later the grantor joined with the trustee in a lease to appellant for a term of years with an option to buy the property. The appellant asked for a conveyance under the option. It was held there was a contingent remainder in the grantor's heirs, subject to the power of appointment, and there was no reversion to her contemplated or possible under the deed.

Of course, since reversions arise by operation of law, the reversion would arise irrespective of the intent of the parties as expressed in the deed. The fact was that the grantor had disposed of all her interest in the land during her lifetime and could make no valid conveyance of it except as provided in her settlement.


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1 81 Ky. 352.
2 497 S. W. 1107, 30 Ky. L. Rep. 211.
3 Ky. Law Rep. 367, 7 S. W. 832.
4 112 S. W. 873.
5 95 Ky. 367, 25 S. W. 597.
Davis, et al., are further illustrations of the principle that under a conveyance to one for life "with remainder to his (the grantor's) heirs," the grantor retains the fee in reversion and he may make a valid conveyance of it during the life tenant's term or if he dies before the life tenant his heirs can convey the reversionary interest in fee. This is so because a reversionary interest is always vested.

In Combs, et al v. Frey a mother conveyed a lot to her son, providing that if the grantee died without issue, then after the death of the grantee or if his wife survive him and die without issue by him, then the lot should revert to the grantor or her heirs. The mother and son joined in a mortgage on the premises and the son thereafter died without issue and the defeasance occurred. It was held that the mother did not part with the reversion by her deed to her son, but did part with it by the execution of the mortgage: "In the case before us the reversion was a present estate in her. . . . The right to the property in case the defeasance occurred was in her."

It seems that if the court is right in describing the son's interest as a defeasible fee, it is wrong in describing the mother's interest as a reversion and as a present interest, for if the son has a defeasible fee, the mother would have a possibility of reverter only, not a present estate but the possibility of an estate in the future, namely, upon the son's dying without issue. Since a possibility of reverter was not a present estate it could not be conveyed at common law and nothing would pass at common law under the mother's mortgage. Under the view taken by the court in Green's Admr. v. Irvine, a possibility of reverter is assignable and therefore the result reached in Combs v. Frey would be correct, or it is possible to take the view that there was really a life estate granted to the son and not a defeasible fee as stated by the court, in which case there would be a reversion in the mother and the mortgage would convey her interest. This latter view is taken by the court in Cramer, et al v. Elins,

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8 188 Ky. 215, 221 S. W. 507.
9 141 Ky. 740.
11 23 Ky. L. Rep. 1757, 66 S. W. 278, also in Halley v. Scott County
A possibility of reverter is the right of the grantor to have the ownership of the land revert to him upon the expiration of the estate granted. As already pointed out, it is not a present interest or estate in the land, but a mere possibility of acquiring an estate. A possibility of reverter is to be distinguished from a right of entry for condition broken. The former requires no act of the one having the right to put the title into him upon the happening of the event which is to terminate the estate of the present holder. A right of entry does require some act upon the part of the one entitled to enter upon the condition being broken, either entry or bringing an action to secure possession, in order to regain the title. "A right to enter was not a reversionary right coming into effect on the termination of an estate, but was the right to substitute the estate of the grantor for the estate of the grantee. A possibility of reverter, on the other hand, did not work the substitution of one estate for the other, but was essentially a reversionary interest—a returning of the land to the lord of whom it was held, because the tenant's estate had determined."

A possibility of reverter after a determinable fee became impossible in England after the statute of Quia Emptores was passed in 1289. This statute provided that whenever one conveyed land thereafter, the grantee should hold under the grantor's lord and not under the grantor as theretofore; in other words, that there should be no further subinfeudation. If B conveyed land which he held under A as overlord to C, C would hold under A and not under B. Thereafter if a fee were granted so long as a certain tree should stand, and should determine upon the happening of the event, namely, the falling of the tree specified, the land would revert not to the grantor but to the lord

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153 S. W. 18.
1 Tiffany, Real Property (2d Ed.), Section 132.
4 Kale's Cases on Future Interests, p. 29.
of the grantor. For this reason determinable fees were not created after the statute *Quia Emptores*. The statute *Quia Emptores*, however, is not in force in Kentucky, since it is provided by statute\(^\text{10}\) that all land titles in this state are allodial, that is, that there are no land tenures. *Quia Emptores* is dependent upon tenure.

It seems clear, then, that there is no reason why determinable fees may not be created in Kentucky. A determinable fee was a fee simple subject to a limitation which might or might not happen. The happening of the contingency named fixed the *quantum* or extent of the estate conveyed. The grantor or his heirs did not secure a new estate upon the happening of the event, but regained his old estate. The stock examples of determinable fees were: "An estate to A till B return from Rome, or an estate to A and his heirs until they cease to be tenants of the manor of Dale;"\(^\text{11}\) or as already suggested, "to A as long as a certain tree shall stand."

The fee simple upon condition is to be distinguished from a determinable fee. The former is a fee which may be defeated by the grantor or his heirs upon the breach of some condition. If no entry were made or action brought for possession upon breach of the condition the fee remained in the grantee. The grantee upon breach of condition has a voidable fee, voidable at the instance of the grantor, while in the case of the determinable fee upon the occurrence of the contingency the estate of the grantee terminated without any steps being taken on the part of the grantor or his heirs. The grantee's estate was at an end and there was a reverting of the estate to the grantor. It is necessary also to distinguish executory limitations for determinable fees when the latter phrase is used in its technical sense. The rule of perpetuities does not apply to possibilities of reverter after determinable fees while it does apply to executory limitations.\(^\text{18}\) An instance of an executory limitation is a devise to a wife in fee, provided, however, that in case she marry again, the land shall be divided among the testator's children. This conditional limitation never is good as an executory devise.

\(^{10}\text{Ky. St., S. 2338.}\)

\(^{11}\text{Gray's Rule Against Perpetuities (3rd Ed.), S. 13.}\)

\(^{18}\text{Gray's Rule Against Perpetuities, Sections 41, 66.}\)
Courts, however, have erroneously called such an estate in the wife a "base, or determinable fee." The position of the Kentucky court that the wife takes a "defeasible fee" is not open to this criticism and has good authority.

To quote from Tiffany in regard to such estates: "Quite frequently it is said that the first taker has in a case of this character a 'defeasible fee,' an expression which, it is submitted, conveys the correct view of the matter, though the expression 'defeasible fee simple,' would be more absolutely accurate. It is to be observed that the use of the word 'defeasible' in this connection is incompatible with the view, above criticised, that the first taker has a determinable fee and not a fee simple, since an estate which comes to an end by the terms of its creation, upon the occurrence of an event named, can not well be regarded as being 'defeated' upon the occurrence of such event."

With the general principles just stated in mind it is interesting to consider some of the cases bearing on the subject of reversionary interests. In Commonwealth v. Polliet, et al., a gift was made in a will to a school district on condition that if the testator's son, who had disappeared, should return and identify himself, the property should go to him. The court said: "The bequest is not to the son, and, in case of his death, then to the school district, but to the school district, subject, however, to be defeated by the return of the son. The return of the son is not a condition precedent to the vesting of the gift, but a condition subsequent, which would defeat the previously vested gift. . . . We, therefore, conclude that the gift to the school district is a defeasible fee, subject to be defeated by the return and identification of the son." The facts in this case seem to be similar to those of the stock example of a determinable fee to-wit, "To A in fee but if B returns from Rome then to B." Then it would seem that the return of the son and his establishing his identity would mark the limit of the interest in the school district and nothing further would be necessary on the part of the son to put title of the property in him. If it were a fee upon

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19 Grant v. Allen, 100 Mo. 293.
21 Elkins v. Thompson, 155 Ky. 91, 159 S. W. 617.
23 25 Ky. L. R. 790, 76 S. W. 412.
a condition subsequent—which could be defeated by the return of the son and his identification, the estate would not be terminated until steps were taken on his part to defeat it, as by re-entry.

The deed in the case of the County Board of Education for Jefferson County, et al. v. Lattrel, et al.,\(^{24}\) provided that the property in question should revert to the grantor and his heirs if the property should cease to be used for public school purposes. The county ceased to use it for school purposes for white children, but began to use it for colored children. The court held that this was a breach of the condition and that this land reverted to the grantors. It was further decided the county board could not remove the school building from the land as provided by a statute passed three years after the conveyance in question, as to allow this would be an impairment of the obligations of contracts. The facts in this case show a condition and a right of re-entry for condition broken and not a reversion. To quote from Professor Kales: "When the conveyance is for certain express purposes or upon a motive expressed, or upon a certain consideration, with a re-entry clause, or if there is a covenant with a re-entry clause the estate is upon a condition subsequent."\(^{25}\) The grantor then had at most a right of re-entry which is not a vested interest until there is a breach of the condition.\(^{26}\) Is it not possible, then, that this decision is wrong as the estate would not vest in the grantor without re-entry on his part or his bringing an action to regain possession, and, furthermore, can it not be said that even though he be entitled to the land, the statute in question should have been held to give the county board the right to remove the building? Since a right of re-entry is not a vested interest until breach of the condition the statute could not be held to have affected any vested rights in this case at the time of its passage and since the provision of the contract can at most be construed to be a provision for a right of re-entry, the right would be subject to the laws and conditions at the time of the breach of condition when the right could be exercised.

\(^{24}\) 173 Ky. 78.


\(^{26}\) Gray's Rule Against Perpetuities (3rd Ed.), S. 114.
In *Martin, et al. v. Adams, et al.*, the court found that the estate conveyed in the deed was a fee simple, granted to a daughter and her three children and conditioned upon the care and support of the grantor for life. It was expressly provided in the deed that if the consideration of support was not complied with the title should be forfeited. A disagreement arose between the grantor and his daughter and the daughter reconveyed the property to her father, who later granted it to the plaintiff in the case. The three children later set up a claim and the plaintiff filed a bill naming them as defendants, to remove a cloud on his title. It was correctly held that the infant grantees had no interest in the land, as there had been a breach of the conditions and re-entry; the grantor who had remained in possession upon the reconveyance had later granted a fee to plaintiff.

Where land has been conveyed or been taken by condemnation proceedings for turnpikes or public highways and then later abandoned, some courts have held that the grantor of former owners recovers the land under a right of reverter. Where the fee remains in the grantor and an easement alone is taken there can be no question that the owner has his land free from the easement upon the abandonment of its use as a highway. Where there is a conveyance in fee for a valuable consideration, as in *Miller v. Flemingsburg and Fox Springs Turnpike Company;* *Langston, et al. v. Edwards, et al.* and *Hughes, et al. v. Miller,* the court has held that there is no reversion in the grantor and that the grantee could dispose of the fee. In *Waller v. Syck,* the court held that a re-location of a road operated as an abandonment of the old road and it reverted to the owner of the land over which it ran. The records did not show whether the county owned the ground occupied by the old road, and the court ruled that in the absence of any showing to the contrary it would presume that the county acquired an easement. Under such a ruling then, the owner would continue to have title to his land, but would hold it free from the easement. The court, how-

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7171 Ky. 246, 188 S. W. 318.
164 Ky. 449, 175 S. W. 631.
146 Ky. 181.
ever, goes on to say: “When its use was abandoned by the county, the ground that was occupied by the road reverted to the appellants, who own the land on both sides of and over which it ran.”

Now, suppose a fee is conveyed in land for turnpike or highway purposes and it is stipulated in the deed that if the land shall cease to be used for that purpose, the fee shall go back to the grantor. Suppose its use as a turnpike or highway is discontinued, does the title vest thereby or must the grantor take steps to put the title back in him by either a re-entry or bringing an action? In *Patterson and Company v. Patterson and Company*, land was deeded to a turnpike company for a tollhouse and it was provided that when the house should cease to be used for such purpose, the land and buildings should revert to a brother and the brothers-in-law of the grantor. Upon a sale of the turnpike to the county for a public highway, the persons named in the deed took possession of the tollhouse. Later they filed a bill in equity against the grantor's heirs to quiet title. The court held that the defendants' demurrer should have been overruled, as the rule against perpetuities did not apply and the interests in the plaintiffs came within section 2359 of the Kentucky Statutes, which provides that rights of reversion may be sold and conveyed. It did not draw a distinction between a possibility of reverter and a reversion. The court said: "If the deed from Nannie Smedley to the turnpike had not provided for the reversion of the title upon the abandonment of the use of the land for tollhouse purposes, nevertheless, under the law of this state, it would in consequence of such abandonment have reverted to the grantor, and, this being true, neither the statute against perpetuities nor other obstacle stood in the way of her providing in the deed its reversion to another or others instead of herself.”

The case of *Kenner, et al. v. American Contract Company* is deserving of more than passing notice. The owner of the land granted a right of way to a railroad company on condition that "should the people of Christian county vote a tax for the build-

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32 135 Ky. 339, 122 S. W. 169.
33 At page 345.
34 9 Bush 202.
ing or completion of said road” the grant should be void. He later devised the land to his widow during widowhood and then to his infant son. Later the railway assigned its interest and on petition of the voters of the county a tax was imposed to aid the assignee in completing the road. The assignee thereafter entered on the land and completed the road. Three years later the widow in her own right and as guardian of the infant son brought an action of trespass on the ground that there had been a forfeiture. One defense offered was that an entry was necessary to complete the forfeiture. The court said: “The doctrine is well settled at common law that no freehold or fee simple estate can be destroyed by the breach or non-performance of a condition subsequent, unless there is an entry by the grantor or his heirs after the breach, or some claim equivalent to it. This common law rule does not apply, however, to estates for years, or to the creation of mere easements, or the grant of an incorporeal hereditament. An estate for years or an incorporeal hereditament is not created at common law by livery or seizin; and whenever the breach of a subsequent condition happens in an estate or grant of this character the estate terminates without any entry. (4 Kent 128.) An estate that must be created by livery cannot be defeated without some act equally notorious; and this is the distinction, so far as the necessity for a re-entry is required, between freehold estates and estates of less duration, when there has been a forfeiture or breach of a subsequent condition annexed.”

It was further contended that the appellants could not maintain the action because they took as purchasers and not as heirs, as at common law, “the grantor or his heirs only, and not a stranger or purchaser, can take advantage of the forfeiture.” The court, however, held: “This right of forfeiture or contingent interest, as well as the land itself, was devised to the appellants, and we see no reason why they did not occupy the same position with reference to this property and the appellee that the grantor did. There was nothing left undevised to pass to the heir, and the action by the heir would have been defeated at once by the production of the will. This identical question was presented in the case of Haydon v. Stoughton (5 Pick. 529), where, upon
the forfeiture of an estate of freehold, it was adjudged that it passed to the residuary devisee, and not to the heir.'"

The court, nevertheless, found that the appellants were not entitled to recover since they had stood by for three years after the breach and allowed the appellee to make valuable improvements on the property thereafter.

As to when the statute of limitations begins to run against the reversioner, the case of Francis v. Wood and Company\textsuperscript{35} lays down the general rule that it does not begin to run until the right of entry exists in him. In Berry v. Hall et al.,\textsuperscript{36} a deed conveyed property jointly to a husband and wife; the husband after the death of the wife conveyed the whole. After his death the children were allowed to recover their mother's moiety as her heirs. The court found that the husband had secured the original conveyance to himself jointly with his wife without her knowledge and in fraud of her rights. It held that he could not gain a title adversely in such a case. The court in Simmons, et al. v. McKee, et al.\textsuperscript{37} allowed the reversioners to maintain a suit during the life of the tenant to establish their claim to the land and to be placed in a condition to make it available when the time should arrive, at which they would be entitled to the use of the estate. The court further held that possession acquired under the life tenant could not be adverse, during the life tenant's lifetime, to those entitled after the termination of his estate.

Thus far we have seen that the Kentucky court adopted the common law definition of a reversion as laid down by Blackstone and Kent, but that it has not always clearly drawn the line between a reversion and a possibility of reverter, nor between the latter and a right of entry. It has held that a possibility of reverter is assignable and has agreed with the Massachusetts court that a right of entry for condition broken may be devised.

\textsuperscript{35} 4 Ky. L. Rep. 616.
\textsuperscript{36} 11 Ky. L. Rep. 30, 11 S. W. 474.

(To be continued.)